Supreme Court, U.S.
FILED
DEC 21 2001

No. 01-681

In the Supreme Court of the United States

DEL COMMERCIAL PROPERTIES, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

EILEEN J. O'CONNOR
Assistant Attorney General

JONATHAN S. COHEN
KENNETH W. ROSENBERG
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, on the facts of this case, a loan nominally made to petitioner by a related Netherlands corporation was in substance made by a related Canadian corporation, so that petitioner is liable for a federal withholding tax on the interest paid on the loan.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	8
Conclusion	18

TABLE OF AUTHORITIES

Cases:

ASA Investerings P'Ship v. *Commissioner*, 201 F.3d 505 (D.C. Cir.), cert. denied, 531 U.S. 871 (2000)	6
Blueberry Land Co. v. *Commissioner*, 361 F.2d 93 (5th Cir. 1966)	15
Commissioner v. *Clark*, 489 U.S. 726 (1989)	17
Commissioner v. *Court Holding Co.*, 324 U.S. 331 (1945)	16
Gregory v. *Helvering*, 293 U.S. 465 (1935)	16
Lucas v. *Earl*, 281 U.S. 111 (1930)	17
Minnesota Tea Co. v. *Helvering*, 302 U.S. 609 (1938)	5, 16
Moline Props., Inc. v. *Commissioner*, 319 U.S. 436 (1943)	10
Northern Ind. Pub. Serv. Co. v. *Commissioner*, 115 F.3d 506 (7th Cir. 1997)	8, 9, 10, 11
United Parcel Service v. *Commissioner*:	
78 T.C.M. (CCH) 262 (1999)	13
254 F.3d 1014 (11th Cir. 2001)	12, 13, 14
United States v. *Basye*, 410 U.S. 441 (1973)	17
United States v. *General Geophysical Co.*, 296 F.2d 86 (5th Cir. 1961), cert. denied, 369 U.S. 849 (1962)	15-16
Winn-Dixie Stores, Inc. v. *Commissioner*, 254 F.3d 1313 (11th Cir. 2001)	16

Treaties and statutes:	Page
U.S.-Can., art. XI, T.I.A.S. No. 11087	4
U.S.-Netherlands, art. VI, 17 U.S.T. 896	4
17 U.S.T. 901	4
Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 127(g)(3), 98 Stat. 494	12
Internal Revenue Code (26 U.S.C.):	
§ 61	13
§ 871	9
§ 881	9
§ 881(a)	3
§ 881(c)(1)	12
§ 881(c)(3)	12
§§ 1441-1442	9
§ 1441	3
§ 1442	3
§ 1461	4
§ 6651(a)(1)	8
§ 6656(a)	8
Miscellaneous:	
1 B. Bittker, *Federal Taxation of Income, Estates and Gifts* (1981)	17

In the Supreme Court of the United States

No. 01-681

DEL COMMERCIAL PROPERTIES, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 251 F.3d 210. The opinion of the Tax Court (Pet. App. 15-24), is unofficially reported at 78 T.C.M. (CCH) 1183.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 2001. The time to file the petition was extended to October 26, 2001, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner is an Illinois corporation whose principal place of business is in Ontario, Canada. It is a

fourth-tier subsidiary of an affiliated group of corporations (the Affiliated Group) whose common parent is DL Shekels Holdings Ltd. Delcom Financial, Ltd. is a second-tier subsidiary in the Affiliated Group. Delcom Financial is a Canadian corporation that owns 100 percent of the outstanding stock of Delcom Holdings, Ltd., another Canadian corporation. In turn, Delcom Holdings owns 100 percent of Delcom Cayman, Ltd. (a corporation organized in the Cayman Islands), which owns 100 percent of the outstanding stock of Delcom Antilles, N.V. (a corporation organized in the Netherlands Antilles). Delcom Antilles owns 100 percent of the outstanding stock of Del Investments Netherlands B.V. (Del BV), a corporation organized in the Netherlands. Pet. App. 2.

b. From 1990 through 1993, petitioner's principal business was leasing industrial real estate that it owned in the United States. Pet. App. 2-3. In 1990, when petitioner needed funding to refinance and improve some of its American properties, one of DL Shekels's first-tier subsidiaries, Tridel Corporation, arranged the following financing scheme (*id.* at 3) (citations omitted):

> On July 18, 1990, the Royal Bank of Canada loaned $18 million (in U.S. dollars) to Delcom Financial. That same day, Delcom Financial made two unsecured interest-bearing loans to Delcom Holdings. One of those loans (the one directly relevant to this case) was for $14 million. Delcom Holdings then contributed about $14 million to Delcom Cayman for common shares of stock. * * * On the same day, "Delcom Cayman contributed about $14 million to Delcom Antilles and received common shares of stock in that entity. Later on that same date,

> Delcom Antilles contributed about $14 million to Del BV and received common stock in that entity."
>
> The following day, July 19, [petitioner] borrowed $14 million from Del BV. That same day, [petitioner] "guaranteed repayment of a portion of amounts owed by Delcom Financial to Royal Bank" and authorized Royal Bank to place a mortgage on its real property in the U.S. * * * [Petitioner] also agreed to provide Royal Bank with "annual financial statements, to insure its real property, to assign the insurance policies to Royal Bank, to defer paying dividends to shareholders, and to use the proceeds from any sales of real property to make payments on the $14 million Royal Bank loan."

c. On January 1, 1991, petitioner began making payments in connection with the loan to Del BV, which then transferred the payments either to Delcom Holdings or Delcom Financial. These funds were then remitted to Royal Bank to pay the principal and interest on the Bank's loan. Beginning in July 1992, however, petitioner made its loan payments directly to Delcom Financial, and Delcom Financial then forwarded the funds to Royal Bank in payment on the Bank's loan. Pet. App. 3-4.

2. Section 881(a) of the Internal Revenue Code requires foreign corporations to pay "a tax of 30 percent of the amount received from sources within the United States * * * as interest * * * to the extent the amount so received is not effectively connected with the conduct of a trade or business within the United States." 26 U.S.C. 881(a). A United States taxpayer who makes such interest payments to a foreign corporation is required to deduct and withhold the tax owed by the foreign corporation. 26 U.S.C. 1441, 1442.

If the United States taxpayer fails to deduct and withhold the tax, it is personally liable for the tax. 26 U.S.C. 1461.

Petitioner did not file withholding tax returns or deposit withholding taxes on any of the interest payments it made in connection with the loan involved in this case. Petitioner asserted that its interest payments were not subject to withholding pursuant to the United States-Netherlands Tax Treaty as in effect in the year at issue, under which interest payments made by United States taxpayers to Netherlands corporations were exempt from taxes in the United States. See Supplementary Convention on Taxes on Income and Other Taxes, Dec. 30, 1965, U.S.-Netherlands, art. VI, 17 U.S.T. 896, 901. The Internal Revenue Service, however, took the position (i) that the interest paid by petitioner was in substance and in fact paid to its Canadian affiliate (Delcom Financial) rather than to its Netherlands affiliate (Del BV) and (ii) that, under the then-applicable United States-Canada Tax Treaty, the withholding tax on interest payments to that Canadian entity as "the beneficial owner" of the interest payments was "15 percent of the gross amount of the interest." Convention on Taxes on Income and Capital, Sept. 26, 1980, U.S.-Can., art. XI, T.I.A.S. No. 11087. See Pet. App. 3-4.

3. On October 30, 1997, the Commissioner of Internal Revenue therefore issued a notice of deficiency to petitioner, asserting that petitioner owed taxes and additions to tax based on the interest payments made between 1990 and 1993. Petitioner then commenced this action in Tax Court to obtain a redetermination of the deficiency.

Following a trial, the Tax Court found that the series of loans and stock contributions that began with Delcom

Financial and ended with petitioner "reflect a step transaction created simply to bypass U.S. withholding tax." Pet. App. 22. The court noted that the Netherlands affiliate had no meaningful business activities and that the lending Bank dealt directly with petitioner and "exacted guaranties from [petitioner] and mortgages or deeds of trust on [petitioner's] U.S. real property." *Id.* at 23. The court emphasized that the payments on the loan "bypassed Del Netherlands completely" and were made by petitioner "directly to Delcom Financial." *Ibid.* In short, "Del Netherlands acted as a mere shell or conduit" and "[i]n substance, [petitioner] received the $14 million loan from Delcom Financial and made the loan payments to Delcom Financial, a Canadian corporation." *Ibid.* The court therefore concluded that petitioner is liable for the unpaid withholding taxes at the rate of 15% specified under the applicable treaty with Canada. *Ibid.* Furthermore, because petitioner had not presented any "credible argument" that its failure to file a tax return or to deposit withholding taxes was attributable to reasonable cause, the court concluded that petitioner was properly liable for penalties in addition to the withholding taxes. *Id.* at 24. The court therefore entered a decision finding petitioner liable for $1,194,573 in taxes and additions to tax. *Id.* at 4.

4. The court of appeals affirmed. Pet. App. 1-16. The court noted that, under what is known as the "step-transaction" doctrine, a specific step in a complicated scheme may be disregarded for tax purposes when "the taxpayer could have achieved its objective more directly, but instead included the step for no other purpose than to avoid U.S. taxes." *Id.* at 6 (citing *Minnesota Tea Co.* v. *Helvering*, 302 U.S. 609, 613 (1938)). In step-transaction cases, "the existence of for-

mal business activity is a given but the inquiry turns on the existence of a nontax business motive." Pet. App. 6, quoting *ASA Investerings Partnership* v. *Commissioner*, 201 F.3d 505, 512 (D.C. Cir.), cert. denied, 531 U.S. 871 (2000). "[T]he absence of a nontax business purpose is fatal" for, while taxpayers "are entitled to structure their transactions in such a way as to minimize tax," there must be a purpose for the "business activity * * * other than tax avoidance," and that purpose cannot be a "facade." 201 F.3d at 512, 513. In other words, "if the sole purpose of a transaction with a foreign corporation is to dodge U.S. taxes," that unnecessary step in the transaction cannot allow the taxpayer to escape the taxes due. Pet. App. 7. For the step involving the foreign entity to be given a substantive role in the determination of tax liabilities, "the transaction must have a sufficient business or economic purpose" apart from tax avoidance. *Ibid.*

The court of appeals emphasized that, beginning in July 1992, it was uncontested that petitioner made its loan payments directly to Delcom Financial. There was no evidence that petitioner paid anything to Del BV during that period. Because the U.S.-Netherlands Tax Treaty does not apply to direct transactions between a U.S. corporation and its Canadian affiliates, the court concluded that petitioner "unquestionably should have withheld taxes on its payments to Delcom Financial beginning in July 1992." Pet. App. 7.

The court of appeals also concluded that, throughout the entire relevant period, any remittances made by petitioner to Del BV had no business purpose other than the avoidance of U.S. taxes because the loan, in substance, was from Royal Bank through Delcom Financial to petitioner. Several facts demonstrated the inextricable linkage of petitioner's payments and the

Royal Bank loan: (i) the interest rates and payment schedules followed by petitioner corresponded to the rates and payment schedules of the Royal Bank loan; (ii) Royal Bank obtained a guaranty of repayment from petitioner and a security interest in petitioner's real property; and (iii) beginning in the third quarter of 1992, petitioner made payments on the loan directly to Delcom Financial at Royal Bank's request. Pet. App. 8. The court of appeals therefore concluded that petitioner failed to carry its burden of proving that Del BV was in substance the real lender for tax purposes *or* that Del BV served any plausible business function in the transaction other than assisting petitioner in its efforts to avoid U.S. taxation. *Ibid.*

The court of appeals specifically addressed and rejected petitioner's contention that the structure of the transaction was adopted in an effort to achieve Canadian tax savings. The court emphasized that petitioner "absolutely failed to carry its burden [of proof]; it did not offer any evidence that the Affiliated Group achieved Canadian tax savings. Indeed, appellant did not submit Delcom Financial's Canadian tax returns. Nor did appellant submit any of Delcom Financial's corporate records." Pet. App. 9. Without that evidence, the court held that there was no basis for a finding that Delcom Financial reported or deducted the interest payments and dividends, or otherwise received any Canadian tax benefits. *Ibid.* The court held that, "[g]iven the state of the record, we cannot possibly conclude that appellant carried its burden before the Tax Court" or that that court clearly erred in finding that the transactions failed to serve any purpose other than avoiding U.S. taxes. *Ibid.* (semble).

The court of appeals also affirmed the imposition of penalties for failure to file tax returns and failure to

deposit withholding taxes. Because petitioner "failed to prove that [the transactions] had any purpose other than avoiding U.S. taxes" (Pet. App. 14), and therefore did not establish "that its failure to file tax returns or deposit withholding taxes was due to reasonable cause," the court held that petitioner was liable for the penalty imposed by 26 U.S.C. 6651(a)(1), 6656(a). Pet. App. 14.[1]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. There is no merit to petitioner's contention (Pet. 9-14) that the decision of the court of appeals conflicts with *Northern Indiana Public Service Co.* v. *Commissioner*, 115 F.3d 506 (7th Cir. 1997). Instead, as both courts below explained in some detail, the decision in *Northern Indiana Public Service* involved different factual claims and a "substantially stronger" factual demonstration by the taxpayer of a business purpose in the transaction other than the avoidance of taxes. Pet. App. 12. As the Tax Court emphasized in this case, unlike the factual record that existed in *Northern Indiana Public Service*, in "the transaction at issue in the present case, the participation of [the Netherlands affiliate] had no purpose other than avoidance of withholding tax." Pet. App. 23.

In *Northern Indiana Public Service*, the taxpayer decided to borrow money in the Eurobond market to construct additions to its public utility properties. To

---

[1] Petitioner has not challenged the calculation or imposition of this penalty in the petition. The single question presented in the petition relates to the determination of the underlying withholding tax liability of petitioner.

effectuate the borrowing, the taxpayer formed a subsidiary corporation (the Finance Subsidiary) in the Netherlands Antilles. The function of that subsidiary was to issue notes in the Eurobond market and to lend the proceeds to the taxpayer. Under a protocol to the Netherlands tax treaty, interest paid to Netherlands Antilles corporations was exempt from tax. By borrowing from the Finance Subsidiary, rather than directly from the Eurobond holders, the taxpayer sought to avoid the withholding tax on interest payments made to foreign individuals and entities. See 26 U.S.C. 871, 881, 1441-1442. To implement this scheme, the Finance Subsidiary issued $70 million of notes in the Eurobond market and re-lent the proceeds to the taxpayer, at an interest rate that was 1 percent higher than the rate it was paying on the notes. During the four tax years at issue, 1982-1985, the Finance Subsidiary earned $700,000 per year from this interest rate spread. Moreover, it invested those earnings to generate additional interest income. 115 F.3d at 508.

When the Commissioner concluded that the role of the Finance Subsidiary in the *Northern Indiana Public Service Co.* case should be disregarded and asserted that the interest payments to the Eurobond holders should be treated as having been made directly from the taxpayer (and were therefore subject to the 30% withholding tax), the taxpayer sought review of the resulting deficiency in the Tax Court. The Tax Court ruled in the taxpayer's favor because it found, as a matter of fact, that the Finance Subsidiary played a bona fide economic role in the transaction and served valid business purposes other than the avoidance of federal taxes. See 115 F.3d at 514. The Seventh Circuit agreed that the transactions of the Finance Subsidiary were to be recognized for tax purposes so long as that

corporation "engage[d] in *bona fide* economically-based business transactions." *Id.* at 512 (citing, *e.g.*, *Moline Properties, Inc.* v. *Commissioner*, 319 U.S. 436 (1943)). The court of appeals further held that the Tax Court's finding that the Finance Subsidiary in that case had conducted a bona fide business function in the transaction had adequate support in the record and was not clearly erroneous. *Id.* at 514. In particular, the Seventh Circuit noted that the Finance Subsidiary "netted an annual $700,000 from its borrowing and lending activities" and than reinvested that income "in order to generate additional interest income." *Ibid.* In addition, the Finance Subsidiary in that case had played a direct economic role in the transaction by "borrow[ing] funds from unrelated third parties, the Euronote holders." *Ibid.*

In the present case, the court of appeals correctly noted that "[n]ot only are the two cases [*Northern Indiana* and this one] not factually similar, but the taxpayer's evidence in *NIPSCO* was substantially stronger than the appellant's evidence in this case." Pet. App. 12. In particular, the Tax Court found in this case that "Del [BV] had only transitory possession of and no control over the $14 million loan proceeds as the proceeds were passed from Delcom Financial to [petitioner]." *Id.* at 22. Similarly, Del BV acted (if at all) only as a conduit for transmittal of loan payments owed to others; these payments were initially funneled automatically through Del BV before they simply bypassed Del BV entirely and were made directly to the Canadian lender. *Ibid.* By contrast, in *Northern Indiana Public Service Co.*, the Finance Subsidiary itself borrowed money on the Eurobond market and earned and invested $700,000 per year of interest on the

spread between the interest rate it charged and the rate it paid.

The different conclusions reached in the present case and in *Northern Indiana Public Service Co.* thus turn on the wholly distinct factual contexts and factual records of the two cases. Indeed, the Seventh Circuit did not dispute in *Northern Indiana Public Service Co.* that transactions involving foreign corporations may be disregarded "if the foreign corporation lacks dominion and control over the interest payments it collects." 115 F.3d at 513. The Seventh Circuit also emphasized in that case that "the Commissioner [may] disregard transactions which are designed to manipulate the Tax Code so as to create artificial tax deductions [but is not to disregard] economic transactions * * * which result in actual, non-tax-related changes in economic position." *Id.* at 512.

As the court of appeals pointed out in this case, while the taxpayer in *Northern Indiana Public Service Co.* "was able to carry its burden of proof" and establish a legitimate business function performed by the Finance Subsidiary in that case, the taxpayer in the present case made no such showing. Pet. App. 12.[2] And, having lost on this factual issue in the Tax Court, it is petitioner "who must establish that the Tax Court's findings were clearly erroneous, which * * * it cannot do." *Ibid.*[3]

---

[2] The Tax Court found, and petitioner does not dispute, that the payments received by Del BV from petitioner were passed through to Delcom Financial to make the loan payments owed to Royal Bank. Pet. App. 19.

[3] The present case is also distinguishable on its facts from *Northern Indiana* because the intermediary here, Del BV, obtained the funds from a related party (Delcom Antilles), while in *Northern Indiana* the intermediary (Finance Subsidiary) obtained

2. Petitioner similarly errs in contending (Pet. 15-18) that the decision in this case conflicts with *United Parcel Service* v. *Commissioner*, 254 F.3d 1014 (11th Cir. 2001). The factual context of *UPS*, and the basis for the court's decision in that case, are widely removed from the present case.[4]

UPS concerned the federal income tax treatment of revenues that United Parcel Service realized from "excess-value charges" (EVCs) paid by shippers to obtain the right to reimbursement for loss or damage above a certain amount per package. Before 1984 (the year in issue), the taxpayer included the entire amount of EVCs in its gross income and took a deduction for claims paid. 254 F.3d at 1016. From 1984 through 1999, however, the taxpayer did not include any amount of EVCs in gross income. Instead, it transferred the net amount of EVC revenues after payment of claims to an independent insurer, National Union Fire Insurance Company (NUF), which withheld excise taxes and certain charges and fees. NUF then transferred the balance of the EVCs to a Bermuda reinsurance company,

---

the funds from unrelated parties on the Eurobond market. Moreover, the significance of the *Northern Indiana* decision is diminished by the fact that, in 1984, Congress amended the Code to specify that "portfolio interest" on foreign loans to U.S. corporations is not subject to withholding (see 26 U.S.C. 881(c)(1)) and added a grandfather provision exempting most pre-1984 Eurobond financings accomplished through Netherland Antilles finance subsidiaries of U.S. parent corporations (Deficit Reduction Act of 1984, Pub. L. 98-369, § 127(g)(3), 98 Stat. 494). The term "portfolio interest," however, does not include interest paid on ordinary bank loans or interest paid to a 10 percent or greater shareholder. 26 U.S.C. 881(c)(3).

[4] Because *UPS* was decided after the court of appeals issued its opinion in the present case, the courts below had no opportunity to address that decision.

Overseas Partners Limited (OPL), that had been specially formed by taxpayer to accumulate net EVC revenues free of income tax in Bermuda. OPL was owned not by the taxpayer directly but by the taxpayer's shareholders. *Id.* at 1016-1017.

The Commissioner determined that the entire amount of EVCs continued to represent gross income for the taxpayer under 26 U.S.C. 61. The Tax Court agreed that the entire amount of the EVCs represented gross income for the taxpayer, and the court allowed a corresponding deduction for claims paid. *United Parcel Service* v. *Commissioner*, 78 T.C.M. (CCH) 262 (1999). The Tax Court concluded that the scheme was a sham lacking any economic substance or business purpose and that it effected a prohibited assignment of income. *Id.* at 278-281, 293.

A divided panel of the Eleventh Circuit reversed the decision of the Tax Court. The majority concluded that the scheme had economic substance because the existence of a "real insurance policy" placed a "real risk" on NUF and moved the economic benefit of EVC income from UPS to OPL. The majority concluded that OPL was "an independently taxable entity that is not under UPS's control." 254 F.3d at 1019. Even though the arrangement "could still be [a sham] if tax avoidance displaced any business purpose," the majority opined that "[a] 'business purpose' does not mean a reason for a transaction that is free of tax considerations. Rather, a transaction has a 'business purpose,' when we are talking about a going concern like UPS, as long as it figures in a bona fide, profit-seeking business." *Ibid.* The court stated that "[t]his concept of 'business purpose' is a necessary corollary to the venerable axiom that tax-planning is permissible." *Ibid.*

The majority of the Eleventh Circuit concluded in *UPS* that the transaction involving OPL had undeniable and real economic effects because, instead of the EVCs being retained by UPS (as had previously been the case), the EVCs were paid to NUF, an independent insurance company, and NUF assumed the risk of damage or loss for the excess-value shipments. 254 F.3d at 1016. After deduction of fees by NUF, the EVCs were then passed on to OPL, "an independently taxable entity that is not under UPS's control." *Id.* at 1019. The Eleventh Circuit majority concluded that "the reinsurance treaty with OPL, while certainly reducing the odds of loss, [did not] completely foreclose the risk of loss because reinsurance treaties, like all agreements, are susceptible to default." *Id.* at 1018. In the majority's view, the result of the transaction was that part of the EVC revenues were expended on NUF's fees before the remainder was transferred to a third party, beyond UPS's control.

It is obvious that the factual circumstances of the present case differ markedly from those in *UPS*. In the present case, nothing in the record suggests that petitioner could not just as easily have borrowed the money it needed directly from the Royal Bank. Indeed, the relevant facts of this case—including, in particular, the fact that petitioner was required to give, and did give, the Royal Bank a guaranty of repayment and a security interest in its real property as a condition of the issuance of the loan—make clear that the interposition of Del BV served no bona fide purpose apart from avoiding taxes. The fact that Del BV served only as a mere conduit for the transaction was confirmed by the fact that loan payments were routinely made by

petitioner directly to Delcom Financial, the entity that in substance loaned the money to petitioner.[5]

In sum, the actual participation of independent parties and the economic substance that the majority of the Eleventh Circuit perceived in *UPS* and which led the court to grant tax recognition to the transaction in that case are both lacking in this case. The decisions in UPS and in the present case reach different results based on the different factual records and different factual issues that they address.

3. Petitioner incorrectly asserts (Pet. 20) that the question it attempts to frame in the petition has "surpassing importance" in the administration of the tax law. As the foregoing discussion illustrates, the cases that have applied the step-transaction doctrine in different factual settings have turned on their individual facts. For many years, courts have addressed and applied the step-transaction doctrine in a wide variety of factual settings, and they have had no problem disposing of taxpayer claims in cases such as the present one, in which there is a transparent lack of nontax business purpose. See, *e.g.*, *Blueberry Land Co.* v. *Commissioner*, 361 F.2d 93, 102 (5th Cir. 1966) (form of transaction not respected for tax purposes when intermediary "in actuality served no real or useful economic purpose apart from tax savings" and instead served solely as a "mere conduit"); *United States* v. *General Geophysical Co.*, 296 F.2d 86 (5th Cir. 1961), cert.

---

[5] Because Del BV had no bona fide role in the arrangement or implementation of the transaction, petitioner was reduced in this case to arguing in the court of appeals that Del BV was included in the transaction in order to achieve Canadian tax savings. As the court below correctly held, however, that theory lacked even a shred of evidentiary support. Pet. App. 8-10. It was therefore properly rejected. See *ibid.*

denied, 369 U.S. 849 (1962) (transfer of assets to shareholders in redemption of stock, followed by same-day reacquisition, did not result in step-up in basis). Because of the fact-specific nature of such taxpayer attempts at avoiding tax obligations, it is unlikely that additional rules could be formulated that would have sufficient breadth and specificity to supply general guidance for the lower courts. For example, in a case decided by the identical panel of the Eleventh Circuit that decided the *UPS* case—on which petitioner prominently relies—that court held that an insurance scheme that was designed to generate interest expense deductions lacked sufficient economic substance to be given effect for tax purposes. See *Winn-Dixie Stores, Inc.* v. *Commissioner*, 254 F.3d 1313 (11th Cir. 2001).

Petitioner erroneously claims (Pet. 7, 9-11, 17) that this case requires only a straightforward application of the precept of *Gregory* v. *Helvering*, 293 U.S. 465, 469 (1935), that "[t]he legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted." Under that rubric, petitioner would have this Court adopt a broad rule that would abrogate the well-established step-transaction doctrine. But this Court has expressly sanctioned the step-transaction doctrine, and the general statement cited by petitioner plainly does not override the holding of this Court that the true nature of a transaction may not "be disguised by mere formalisms, which exist solely to alter tax liabilities." *Commissioner* v. *Court Holding Co.*, 324 U.S. 331, 334 (1945). See also *Minnesota Tea Co.* v. *Helvering*, 302 U.S. 609, 613 (1938) ("[a] given result at the end of a straight path is not made a different result because reached by following a devious path"). Under the step-transaction doctrine, as sanc-

tioned by this Court, federal tax liability is to be based "on a realistic view of the entire transaction" rather than on artificial devices employed by a taxpayer merely for the purpose of avoiding taxation. *Commissioner* v. *Clark*, 489 U.S. 726, 738 (1989) (quoting 1 B. Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 4.3.5, at 4-52 (1981)).

4. Petitioner asserts (Pet. 19-20) that the "assignment of income" doctrine precludes the "assignment" of income belonging to Del BV to any other taxpayer, such as Delcom Financial. That argument lacks merit. The assignment of income doctrine prevents a taxpayer from avoiding taxation on earned income by assigning the right to receive the income to another person. See, *e.g.*, *United States* v. *Basye*, 410 U.S. 441 (1973); *Lucas* v. *Earl*, 281 U.S. 111 (1930). When an intermediary serves as a mere conduit, and does not fulfill any business purpose other than tax avoidance, recasting the transaction in accordance with economic reality is not an assignment of income. It is instead the attribution of income to its rightful owner. See, *e.g.*, *Commissioner* v. *Clark*, 489 U.S. at 738. Petitioner's contrary contention simply misapplies the basic doctrines that govern this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

EILEEN J. O'CONNOR
Assistant Attorney General

JONATHAN S. COHEN
KENNETH W. ROSENBERG
Attorneys

DECEMBER 2001